UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DONALD M. MERRITT,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-32-P-C***
	)	
SHIRLEY S. CHATER,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Supplemental Security Income ("SSI") appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner's determination that the plaintiff has a residual functional capacity of a full range of light work. I recommend that the court affirm the Commissioner's decision.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial

[1]This action is properly brought under 42 U.S.C. § 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 9, 1996 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

gainful activity since December 31, 1990, Finding 5, Record p. 24; that he had chronic pain, a severe impairment which does not meet or equal any of the impairments listed in Appendix I to Subpart P, 20 C.F.R. § 404, Finding 6, Record p. 24; that his statements concerning his impairment and its impact on his ability to work were not entirely credible in light of the degree of treatment required, his assertions concerning his work activity and discrepancies between his assertions and information contained in the documentary reports, Finding 7, Record p. 24; that he lacked the residual functional capacity to lift and carry more than twenty pounds, or more than ten pounds on a regular basis, Finding 8, Record p. 25; that he was unable to perform his past relevant work as a machine operator, farm worker, pallet maker and firewood cutter, Finding 9, Record p. 25; that he had no significant non-exertional limitations, Finding 10, Record p. 25; and that, based on an exertional capacity for light work, his age (37 on November 2, 1994), his educational background (limited) and his work experience, application of Rules 202.17, 202.18 and 202.19 of Appendix 2 to Subpart P, 20 C.F.R. § 404 ("the Grid"), directed a conclusion that the plaintiff was not disabled at any time prior to the Administrative Law Judge's decision on February 9, 1995, Findings 11-14, Record p. 25. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of*

Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

Residual Functional Capacity

The plaintiff argues that there is not substantial evidence in the record to support the finding that he had a residual functional capacity of a full range of light work. At this stage, the fifth step of the sequential evaluation process, 20 C.F.R. § 416.920, the burden is on the Commissioner to show that the plaintiff can perform other work. *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the Commissioner's findings regarding the plaintiff's residual work capacity to perform work other than his past relevant work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff contends that none of the medical records provided a "complete" evaluation of his residual functional capacity and that the Commissioner was therefore required to order a neurological examination with evaluation of residual functional capacity before issuing a decision. He relies on *Carrillo Marin v. Secretary of Health & Human Servs*., 758 F.2d 14, 17 (1st Cir. 1985), to support this argument. The obligation of the Commissioner to develop an adequate record set forth in *Carrillo Marin* is most compelling when the claimant is unrepresented by counsel at the hearing. *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 80-81 (1st Cir. 1982) (Commissioner's responsibility to develop evidence increases in cases where claimant is unrepresented, claim seems on its face to be substantial, there are gaps in the evidence necessary to a reasoned evaluation of the claim, and it is within power of judge, without undue effort, to see gaps somewhat filled).

Here, the plaintiff was represented by counsel at the hearing. In addition, in *Carrillo Marin*

the First Circuit merely stated that the appropriate course when the Commissioner (then the Secretary) is doubtful as to the severity of a claimant's disorder is to request a consultative evaluation. 758 F.2d at 17. Here, there is substantial evidence in the record to support a finding concerning residual functional capacity and therefore no reason for the Commissioner to be doubtful. That evidence includes the reports of Vance Masci, M.D., and G. T. Caldwell, M.D. For example, Dr. Masci stated in October 1993:

> 1). No significant shoulder dysfunction. 2) No significant impairment secondary to lumbar disease. . . . He may have some element of degenerative disease of his lumbar spine. X-rays would be helpful to evaluate that. However, I see no medical condition which is apparent today which would prevent him from doing any job that he chose."

Record, pp. 141-42. Dr. Caldwell stated in September 1994: "The disability is caused by chronic pain. He would be very appropriate for a functional restoration program . . . . I doubt whether he will be able to return to any sort of heavy duty work to which he is accustomed." *Id*. at 201.

The plaintiff also argues that the Administrative Law Judge misinterpreted the available medical records. He contends that the evaluation of his residual functional capacity by his treating physician, Neil Korsen, M.D., should have been given more weight than that of Dr. Masci, because it was more recent and had the benefit of other medical data, citing 20 C.F.R. § 404.1527(d)(3).[2] An administrative law judge is not required to give more weight to a treating physician's report than to the report of a consulting physician. *Keating v. Secretary of Health & Human Servs*., 848 F.2d 271, 275 (1st Cir. 1988). The administrative law judge may rely on a consulting physician's report when it conflicts with other medical evidence. *Rodriguez Pagan v. Secretary of Health & Human Servs.*,

[2] The appropriate regulation for an SSI appeal is 20 C.F.R. § 416.927(d)(3). However, the substance of the two regulations is identical.

819 F.2d 1, 4 (1st Cir. 1987), *cert. denied sub nom Pagan v. Bowen*, 484 U.S. 1012 (1988). While Dr. Korsen had seen the plaintiff four times before writing his report, and Dr. Masci had seen him only once, Dr. Korsen's records present neither more medical signs nor laboratory findings than does Dr. Masci's report, rendered less than two months before Dr. Korsen first saw the plaintiff. Record pp. 139-47. Under the circumstances, 20 C.F.R. § 416.927(d)(3) does not require that more weight be given to Dr. Korsen's report than to that of Dr. Masci.[3]

The Administrative Law Judge could have considered the alleged deficiencies in Dr. Masci's evaluation along with the differences between his conclusions and those of Dr. Korsen. Resolutions of conflicts in the evidence, however, are for the Commissioner, and the court "must affirm the [Commissioner's] resolution, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence." *Rodriguez Pagan*, 819 F.2d at 3.

Credibility

The plaintiff also disputes the finding that his testimony was "not entirely credible," Finding 7, Record p. 24, suggesting that this finding led the Administrative Law Judge to discount the report of Dr. Korsen and to "gloss over," Statement of Errors (Docket No. 3) ("Statement") at 8, n.10, the results of an MRI study and the reports of Sean T. Hanley, M.D., who evaluated the plaintiff's

[3] The plaintiff submitted additional office records of Dr. Korsen to the Appeals Council eight months after the Administrative Law Judge issued his decision. Record pp. 6-10. While evidence submitted to the Appeals Council in this manner becomes part of the administrative record, *Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996), it does so only to the extent that "it relates to the period on or before the date of the administrative law judge hearing decision." 20 C.F.R. § 416.1470(b). The date of the decision in this case was February 9, 1995. Record p. 26. Therefore, Dr. Korsen's notes concerning office visits after that date, *id*. at 7-8, may not be considered. The office notes concerning three earlier visits, *id*. at 9-10, do not differ from nor add significantly to Dr. Korsen's earlier report and records, *id*. at 143-47.

shoulder pain at Dr. Korsen's request, and Dr. Caldwell. However, the plaintiff merely states that the MRI study and the Hanley and Caldwell reports constituted "substantial corroborating evidence of the Claimant's severe impairments." *Id.* The Step 2 finding of severe impairment is not at issue in this appeal.

Dr. Hanley made no findings concerning disability. Record p. 177. Dr. Caldwell found "a lack of physical findings to explain such severe right shoulder pain" and recommended "reversing the disability . . . caused by chronic pain" with a "functional restoration program with emphasis on improving activity and health." *Id*. at 201. This is not inconsistent with Dr. Korsen's report concerning the plaintiff's pain. *Id*. at 143-44. Dr. Korsen is the only physician who mentioned the MRI, and, as counsel for the plaintiff acknowledged at the hearing, he appeared to find it unremarkable. *Id*. at 192. Thus, the consideration of error in connection with the plaintiff's credibility argument is limited to its effect on the Administrative Law Judge's evaluation of Dr. Korsen's report.

A credibility determination by an administrative law judge who has observed the claimant, evaluated his demeanor and considered how his testimony fits with the evidence is entitled to deference, especially when that determination is supported by specific findings. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987). The Administrative Law Judge in this case did make specific findings concerning the plaintiff's credibility. Record pp. 21-22.

It has already been established that the Administrative Law Judge was not required to accept Dr. Korsen's conclusions in the face of conflicting medical evidence. The plaintiff nonetheless attacks five specific findings made by the Administrative Law Judge to support his conclusion

concerning the plaintiff's "not entirely credible" testimony.

Contrary to the plaintiff's assertions, the Administrative Law Judge did not find that the plaintiff had no medical treatment between 1984 and 1993, but only that he "has not required regular medical treatment since" 1984 and that "[t]here is no record of any significant treatment after [1989] until 1993." *Id*. at 21. The statement by Lowell E. Barnes, D.O., who the plaintiff claims treated him in the early 1980s, that his records were destroyed in a fire, *id*. at 198, is not inconsistent with this finding. The plaintiff's second asserted error is that, by mentioning his failure to file tax returns for six years, the Administrative Law Judge is penalizing him for that failure. However, a review of the decision makes clear that the Administrative Law Judge mentioned this failure only in regard to the plaintiff's initial report that his medical condition made him stop working in 1984, when he testified at the hearing that he had worked into 1990. Exh. 15, Record p. 107; Testimony, Record pp. 51-52. The plaintiff next asserts that the observation of Dr. Caldwell, who examined him on September 26, 1994, that his calloused and dirty hands gave "the impression of recent fairly heavy work" despite his claims of a very inactive lifestyle without work for two years, Record pp. 199-200, should not have been adopted by the Administrative Law Judge. There is no contradictory evidence concerning the plaintiff's hands in the record, and the Administrative Law Judge is not required to speculate about alternative reasons for observations made by witnesses, or to ignore those observations when they are uncontroverted. The plaintiff next raises the report of Dr. Masci, essentially repeating the argument concerning the weight to be given to this report which was discussed above. This issue does not affect the credibility finding.

Finally, the plaintiff asserts that the Administrative Law Judge "made much," Statement at 7, of the discrepancy between the date given in his disability report as the date upon which his

medical condition made him stop working, September 23, 1984, *id*. at 107, and his testimony at the hearing that he stopped working in 1990, *id*. at 52. He asserts that the Administrative Law Judge "never asked the Claimant to resolve these inconsistencies" at the hearing. Statement of Errors at 7. Of course, the plaintiff, who was represented by counsel at the hearing, had every opportunity to attempt to resolve any inconsistency. While this discrepancy may have provided a basis for the finding that "[t]he claimant's statements concerning his impairment and its impact on his ability to work are not entirely credible in light of . . . the claimant's assertions concerning his work activity," *id*. at 24, this factor alone is insufficient to offset the deference to be accorded to the credibility findings of the Administrative Law Judge, which were based on several other findings as well.

Because the Commissioner's decision is supported by substantial evidence, I recommend that it be **AFFIRMED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 12th day of December, 1996.

David M. Cohen
United States Magistrate Judge